SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 107.

INTERNATIONAL SHOE COMPANY, a Corporation,
Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT, and E. B. RILEY, Commissioner,
Appellees.

Appeal from the Supreme Court of the State of Washington.

APPELLANT'S REPLY BRIEF.

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I.

Concerning Appellees' Statement of Facts.

To show activities and localization in Washington, Appellees assert certain things to be facts which are not supported by the record and derive implications from other facts which are without justification.

(Br. 10, par. 5) Appellees state that the salesmen "are employed by the company and work (in the state of Washington)." This statement may be construed to mean

that the employment is effected or done in the State of Washington. We assume the Appellees did not intend this meaning. The facts are to the contrary.

(Br. 11, pars. 6 and 7) These paragraphs imply that the company maintains a stock of merchandise—samples—in the State of Washington in "sample or display rooms (cost advanced by salesmen, who are reimbursed by the company)." These samples are not "merchandise," because there is only one shoe—not a pair. They are really tools, entrusted to the possession and used by the salesmen in their operations. The display rooms do not belong to the company. The salesmen are permitted to rent display rooms for their own convenience and the company pays this expense, as it does all the other necessary or proper expenses of the salesmen.

(Br. 11, par. 10) "Salesmen are in this state continuously active in their respective territories devoting full time to the building up of the business of the company within the state." On the contrary, it is stipulated (R. p. 17) that the salesmen's duties and authority are limited to the solicitation of orders. If they are building up any business, it is their own business, for all they do for Appellant is solicit orders.

(Br. 12, par. 14) Appellees assert that the fact that credit is extended by the company to Washington purchasers indicates "an interest of the company in stocks of merchandise held in this state by purchasers." We are at a loss to know what Appellees mean by this statement. The fact stated—sale on terms of credit—has no such implication. Appellees seem to mean by the word "interest" an ownership interest. If that is the meaning, it is contrary to all of the facts. Appellant has no interest in any stock of merchandise held in Washington by purchasers.

Appellees further state in this paragraph and in their argument (Br. p. 30) that the "company checks on credit, in part at least, through its salesmen." The record does not sustain this statement. It discloses that at conventions in St. Louis the salesmen at times protested against the company's limitations upon the credit of persons from whom they obtained orders. Possibly the company acceded to their protest and removed the credit limit, but there is no basis for the statement that they checked on credit of purchasers through the salesmen. We cannot find the significance of this fact and point to it merely because Appellees seem to rely on it so extensively.

The statements in Appellees' brief seem to be framed to indicate that Appellant has goods on consignment in the State of Washington. Such is not the fact.

II.

The Tax Is Upon Payment of Wages, Not Upon Rendering Services. The Excisable Act Was Not in Washington.

Appellees' brief necessitates an exact finding of the incidence of the tax. They say that the "tax in question is imposed against Appellant **on services performed for it within the State of Washington** and not, as Appellant would have us believe, upon **wages payable to individuals performing such services**" (Br. p. 17). There is some discussion of the proposition that the imposition is an exercise of the police power.

However this may be, the contribution is a tax—a "duty, impost or excise," for "together, these classes include every form of [indirect] tax appropriate to sovereignty." *Charles C. Steward Mach. Co. v. Davis* (1937), 301 U. S. 548, 581, 81 L. Ed. 1281, 1288. The contribution is the method chosen to defray the cost of an exercise of

the police power. In this, it does not differ from other taxes. Since this is so, the tax must be imposed upon the exercise of some privilege or the doing of some act by the Appellant. A tax may not be imposed upon one person for the exercise of a privilege by another, and the salesmen's rendering of services does not support a tax upon Appellant.

To find the taxable incident it is necessary only to read the statute: Section 7, Chapter 162, p. 587, Session Laws of 1937, as amended (Rem. Rev. Stat. Supp. section 9998-107) provides that the tax accrues "with respect to wages payable for employment." Bearing in mind that the tax is upon the employer, it is apparent that "wages payable" must be the subject of the tax. The tax is not upon employing the employee. If he renders no service, no tax is payable. If he renders service, but no wage is payable, no tax is owing.

The statute is related to the federal statute imposing a tax on employers (I. R. C. Sec. 1410, U. S. C. A., Tit. 26, Sec. 1410). That section reads in part as follows:

> "In addition to other taxes, every employer shall pay an excise tax, * * * **with respect to having individuals in his employ,** * * * equal to the following percentages of the wages * * * paid by him.. * * *"

The legislature of the State of Washington wrote the Washington statute with the federal statute in mind. The legislature of the State of Washington deliberately avoided the words of the federal statute. They provided that the tax is imposed **"With respect to wages payable for employment."**

It is plain that there was a deliberate and considered purpose in avoiding the words of the federal statute, to-wit, that the tax is imposed "with respect to having individuals in his employ." The Washington statute

deliberately imposes the tax "with respect to wages payable" as distinguished from "with respect to having individuals in his employ."

The Washington tax is upon the act of paying or becoming obligated to pay wages for employment—an act of the employer. Having him in employ—the excisable act under the United States statute (*Steward Mach. Co. v. Davis*, supra)—is also the act of the employer. The rendition of services is the act of the employee. **The acts of the employee are not excisable against the employer.** It has already been pointed out that the excisable act or relationship is in Missouri, not in Washington. Appellees admit (Br. p. 25) that the wages are not paid in Washington, saying, "payment * * * being made outside the state."

Appellant enjoys no privilege in Washington; it does not act there by virtue of the laws of that state; it pays no wages there; has no physical assets there; receives there no benefit of any services, for all its business is consummated elsewhere.

The stipulation of facts is silent on whether or not the tax has been paid to Missouri. But in any event, the record shows that the full tax has been paid to the federal government at the rate of 3% (R. pp. 19, 20 and 21). Thus, the full amount claimed has already been paid, and is available for administration of unemployment compensation. Federal Social Security Act, Act of Aug. 14, 1935, c. 531, Tit. III, Sec. 302, and Tit. IX, Sec. 904, 49 Stat. 626 and 640, 42 U. S. C. A., Section 502 and Section 1104; *Chas. C. Steward Mach. Co. v. Davis* (1937), 89 F. (2d) 207, affd. 301 U. S. 548, 81 L. Ed. 1279.

As we have heretofore pointed out, even though Appellant may be required to respond to summons in the State of Washington, that is, even though Washington tribunals may have the right to bring Appellant before them, the basic problem remains—can the State of Washington cre-

ate a liability against Appellant—impose a tax because of acts, rights, or privileges exercised by Appellant in Missouri?

On page 17 of Appellees' brief they distinguish between a tax "on the **privilege** of doing business within the state" and an "excise tax on the **right** to have persons performing services" within the state. If there is any difference between a privilege and a right, it is that a privilege can be exercised only if granted while a right exists as matter of course. Prior to the establishment of the federal-state unemployment compensation, Appellant as a foreign corporation had the right to have its salesmen soliciting orders in the State of Washington and was not subject to either a privilege or an excise tax in that state. Unemployment compensation did not change the situation. It did not grant a new privilege or create a new right. More importantly, it did not, and Congress could not, confer on the State of Washington the power of extra-territorial taxation. If, as the Appellees assert, Appellant had a right to have persons in Washington solicit orders for its merchandise, that right, like other intangibles, was vested in Appellant at its domicile beyond the jurisdiction of the State of Washington.

III.

Appellant Was Not Present in Washington.

Any suggestion that the answer to the question of whether Appellant is doing such business within the state as to justify the legal conclusion that it is "present" in the state determines the validity of the assessment here involved is not sound. This goes just half way. If Appellant is not present in the state (and we assert it is not), then the tax may not be imposed. The converse is not true. Mere presence does not authorize the imposition of tax, **for there must also be an excisable act within the jurisdiction of the state.**

It seems to be agreed that if Appellant's activities were not such as would authorize substituted service as the basis of a suit, then there was no jurisdiction to assess. It is also recognized, as it must be, that mere solicitation is not enough. Therefore, Appellees argue that there is more than mere solicitation. But the cases which establish the rule that mere solicitation does not confer jurisdiction involve at least as much activity as is shown here. The agents of Appellant had "no authority beyond solicitation," as in *Peoples Tobacco Company, Ltd., v. American Tobacco Company* (1918), 246 U. S. 79, l. c. 86; 62 L. Ed. 587. The activities were less than those involved in *Green v. Chicago, B. & Q. R. Co.* (1907), 205 U. S. 530, 51 L. Ed. 916.

It is submitted that, in determining whether or not a court has jurisdiction of a defendant in a suit and whether a state has jurisdiction to assess a tax there are three considerations:

(a) The service should be such as is reasonably calculated to give notice of the proceedings. To acomplish this, the person served must have a position of responsibility with the defendant. In all the cases his duties are related to the matter in suit. That a salesman may be served in a suit involving, for example, damages for breach of warranty of quality, does not indicate that he may be served in a suit for damages for personal injury in a defendant's factory. In the instant case, the salesman served, whose authority was limited to the solicitation of orders, had nothing to do with payment of taxes—could not pay money at all, nor receive it. Any action by him in the matter would have exceeded his authority. He could not admit liability nor any material fact.

(b) The convenience of plaintiff and defendant in having the suit in a particular jurisdiction is to be considered. A defendant should not be required to journey to a

remote place to make his defense, unless he has come there voluntarily. In the instant case, Appellant has not gone to Washington, but has centralized its activities in Missouri. The salesmen come to Missouri for instructions; the offers to buy goods are sent to Missouri for acceptance or rejection. The goods are sold in Missouri. The intent to avoid traveling to Washington is clear.

(c) The service should be such as indicates power to enforce a judgment based upon it. This is probably the paramount aspect of valid service, and alone supports service by publication, for example, and service by affixing notice to property or by attachment. The service should indicate that something can be done in the event of default. No convenience is afforded a plaintiff if he can be given only a judgment and must bring a separate suit upon the judgment, elsewhere. He can as easily bring the original suit where the judgment is to be enforced. Service upon a mere solicitor does not indicate the existence of anything for the enforcement of a judgment. No property is attached; no person who can do anything (as pay money) is brought under the control of the court. The instant case is extreme: if the assessment is determined to be valid, the salesman served has no funds or property of his employer out of which to pay it; nor is there any indication of how it may be enforced.

The case of *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, illustrates this aptly. The salesmen in that case had authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky. Inferentially, therefore, they had authority to indorse the notes for collection. They controlled money in Kentucky; the corporation had assets controlled by the Kentucky residents, out of which a judgment might be paid. In the instant case, the only property in Washington is advertising matter, sample shoes of no value, for there is only one shoe of each pair.

Appellant does not claim any immunity because of the power of Congress to regulate interstate commerce or because the state tax burdens such commerce. Washington's incapacity to impose the tax upon rights or privileges exercised outside of Washington is intrinsic in the nature of sovereignty, because its jurisdiction may not extend beyond its borders. Immunity rests upon the settled principles of comity between sovereigns. One sovereignty may not claim contributions (taxes) from visitors from neighboring sovereignties resting upon acts which they did at home. "Can the Island of Tobago," asked Lord Ellenborough, "pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Buchanan v. Rucker* (1808), 9 East 191.

IV.

Appellees Rely Upon Authority Which Is Not Applicable.

Appellees, in their brief, assert that Edward S. Alley, the salesman upon whom service was made, had authority to receive service. In this, they contradict the stipulation of facts (R. p. 17), which states "The salesman's duties and authority [are] limited strictly to the solicitation of orders." This leaves no room for an inference of larger powers. There is no reason for such an inference in this case, which does not involve any alleged wrong committed by the salesman or any injury suffered by a resident of the State of Washington. Appellant has scrupulously avoided committing any injury in that state. It would not be asserted that a person injured in Missouri, for example, could go to Washington to bring suit, and obtain service on appellant by service on Mr. Alley.

Three propositions are clear, then, and each determines this case: First, that jurisdiction is not obtained by service on a salesman whose entire authority is merely to solicit

orders for the corporation's goods. This rests on the authority of the salesman; Second, that mere solicitation of orders in a state is not such doing of business as will support service upon an agent of a corporation; and Third, that in order that a state may have jurisdiction, to create a personal liability [to exist], the corporation must be present within the state, doing some act there subject to its laws. An analysis of the cases cited by Appellees in the light of these principles shows that they are not in point upon the questions presented.

In *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, the company was doing business in the state which imposed a tax with respect to doing business in the state measured by gross premiums. The company objected to inclusion in the measure of the tax of premiums paid outside the state by residents of the state. There was no question of the validity of service nor of the jurisdiction of the laws to create a liability. The only question was whether the measure of the liability was arbitrary and unreasonable.

We do not find in *Steward Machine Company v. Davis* (1937), 301 U. S. 548, 580 et seq., 81 L. Ed. 1279, the holding which appellees assert (Br. p. 21).

In *General Trading Company v. State Tax Comm. of Iowa* (1944), 322 U. S. 335, 88 L. Ed. 1309, no question was raised of the sufficiency of service. The tax liability was imposed upon an individual resident of Iowa upon his use of the articles purchased, unquestionably subject to the state's laws. The Court said:

> "The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government."

Therefore there was no question of liability for tax. Apparently the General Trading Company appeared vol-

untarily to contest the tax liability of its customers. It does not appear how service of process was made.

In *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, the authority of the agents of the company exceeded mere solicitation, as has been shown, and at the time the liability attached it was present in Kentucky, being licensed to do business there.

The case of *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. Ed. 832, was cited in appellant's original brief to one point only: that lacking jurisdiction, a state's imposition of a liability on a non-resident is not due process, in fact is no process and therefore invalid under the constitution (for power is wanting even if the non-resident is not engaged in commerce). The question whether or not the tax here in dispute is a burden upon interstate commerce, under this Court's restrictions, is not open to argument. The insurance cases cited by appellees confirm the rule that in order for the liabilities and duties created by the laws of a state to attach, there must be jurisdiction. The insurance companies were present in the state, or had interests by virtue of writing insurance on property in the state, so that the obligation might attach.

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 85 L. Ed. 267, cited on page 21 of Appellees' brief, is not controlling. The primary reason for sustaining the tax there involved is stated by Mr. Justice Frankfurter as follows:

> "The substantial privilege of carrying on business in Wisconsin clearly supports the tax and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders."

The tax was sustained as a tax upon corporate income received in Wisconsin, the imposition or collection of which tax was postponed until dividend was declared.

In this case the tax is upon wages paid or payable outside the State of Washington and it is not conditioned upon any right or privilege granted or conferred by Washington. The privilege of sending its representatives into Washington to solicit business in interstate commerce is neither granted, nor can it be denied by the State of Washington. As to individual employers the privilege is one of citizenship of the United States, and the Washington statute has the same application to non-resident individual employers as it has to non-resident corporate employers.

In the instant case, Appellant is not within Washington; there is nothing to which the liability to pay the tax can attach, and no person is or ever has been in Washington who is made liable, or whose authority is such that liability can be attributed through him to the Appellant.

In view of Appellees' argument (Br. p. 49) that the law provides no sanctuary for Appellant from tax, it must be noted that Appellant seeks no such sanctuary, but has already paid to the Federal Government (as is stipulated) the full amount of the tax properly due (R. pp. 19, 20, 21). If the assessment is paid, it will be turned over to the Secretary of the Treasury of the United States of America (Section 9, Ch. 162, Session Laws of 1937 of Washington; Rem. Rev. Stat. Supp., Sec. 9998-109). It is asserted that Appellant paid tax to the wrong person—having paid to the Federal Government. Instead of Appellant seeking sanctuary from tax, rather Appellees seek a bonanza, a payment to them, in duplication of what has already been paid, under the statute, to the Federal Government for the benefit of all the states including Washington. The taxing authorities of all the States of the Union could make the same accusation, with the same candor and conviction. Whether or not the tax has been paid to Missouri, on which question the record is silent, it has

been paid to the United States, and no credit has been, or can be, allowed for payment which is now claimed again by Washington. Appellant seeks sanctuary from repeated collections of the same tax, not by hiding behind sales agents, but by appeal to this Court.

Respectfully submitted,

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